R v Roche, 2024 NWTSC 57

Date: 2024 12-13
Docket: S-1-CR 2021 000 033

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

-and-

ALEX ROCHE

Heard at Yellowknife**:** September 23 - 27, 2024

Written Reasons for Judgment filed: December 13, 2024

REASONS FOR JUDGMENT

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Counsel for Crown: A. Paquin

Counsel for Accused: J. Hale

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[1] Alex Roche has been charged on a single count indictment, that alleges that on or between Dec. 28 and 29, 2020, at or near the town of Hay River in NWT, did commit a sexual assault on J. P., contrary to s. 271 of the CC. He has pleaded not guilty and re-elected trial by judge alone. Closings were completed yesterday, and I am now in a position to deliver my decision.

[2] Defence counsel Mr. Hale indicated at the outset of the trial that the defence did not dispute that the accused and the complainant had sexual intercourse on the night in question. The issue to be determined is one of consent.

[3] The evidence as to what transpired in the weeks leading up to and including the night in question came entirely from the complainant. The Crown's case will stand or fall on the court's assessment of the credibility and reliability of her evidence.

[4] Given the importance of the complainant's evidence, I will review it in some detail.

[5] The complainant is 36 years of age and is francophone, having been born in Quebec, where she now lives. She lived in Yellowknife from 2017 to 2020, and then obtained a job in Hay River in mid-November, 2020. She resided with her friend E. for the first few weeks, and then got her own apartment on McBryan St., which she shared with a co-tenant, beginning December 1, 2020.

[6] While she was staying with E. in the latter part of November, she met the accused. She and a group of friends were at the bar at the curling club in Hay River. When they went outside for a cigarette, they were approached by accused and his friend D., and made their acquaintance. The group then went back to E.'s place to socialize. E. and the accused hit it off, and ended up spending the night together. He had some, but not much, interaction with the complainant during the evening, in the nature of friendly conversation. D. and the complainant showed some interest in each other.

[7] The next morning the accused left, but they saw him again, off and on, throughout the weekend. They all exchanged Facebook addresses.

[8] On Monday Dec. 28, 2020, the complainant was boarding a flight from Yellowknife to Hay River, after spending Christmas there with friends. The accused contacted her on Facebook Messenger and asked if she was available to see him, and E. also. He also asked if her friend S. would like to join them. The complainant invited him and his friend D. to her place. The complainant knew that E. was not available, because she was in Alberta for the holidays.

[9] The accused arrived shortly after 7 p.m. at the complainant's residence. Her roommate was home at the time. D. was not with him, as he needed to stay home with his kids. The accused brought a half-full 60 oz. bottle of vodka with him, which he and the complainant drank from during the ensuing evening. I should point out, though, that there is no suggestion that either party ever became intoxicated at any material time.

[10] The roommate socialized with them for a relatively short period of time, but then went to bed because she had to work early the next morning at the hospital. She did so around 8 to 8:30 p.m., leaving the complainant and accused alone together. They phoned Sandy to see if she could join them, but she declined the invitation.

[11] The complainant and accused continued to sit on the couch beside each other, and conversed together. They were also listening to music, and the accused complimented the complainant's singing voice when she sang along. At one point

he approached her, put his hands around her face to bring her closer to him, and kissed her on the lips. Her reaction was to move backwards, and she told him she did not really invite him for that, and that her intention was nothing more than being friends. He responded by saying "Thanks for not giving me a slap in the face." He indicated that "I get it" and that he won't do it again.

[12] From that point their conversation became more intrusive. The accused was asking personal questions, like why is she single, and what happened with her "ex" that it didn't work out. She felt uncomfortable that the two of them were alone in the room, and started to try to find things that would take them out of the house. The problem is that it was Monday night, and in Hay River there was not much going on. She called a couple of places and the only place open was the Doghouse, which is a local pub that serves food. However, it was already past 9 p.m., and the Doghouse closed at 10, so they decided that there wasn't time walk there, and that instead they would stay at the apartment and cook some food. They did so, but then the conversation started again on the same topic, with the accused asking probing questions as to why things did not work out with her ex, or making negative comments about E. or D.. She told him several times that she did not want to talk about it. At one point she started crying, and mentioned again that it was a sensitive topic discussing her ex, and she did not invite him here for that. The accused's reaction was again to say he was sorry and won't do it again.

[13] They were sitting on two stools when she started to cry. The accused put his arm around her shoulders and waist to comfort her. Again, he tried to kiss her. She pushed back, and they again had the same conversation they had had on the couch. She told him if you understand my limits you can stay; otherwise, you can go. His reaction was to apologize again and again.

[14] Eventually it was around midnight or 1 a.m. The complainant was tired and asked the accused to leave. He tried to arrange a ride from a friend but was unable to reach him. The accused proposed that they go to sleep, without any physical intentions. She asked him again if he could leave and leave her alone. His response was that it was winter and he had no transportation. Since she had had something to drink, albeit not a lot, she did not want to take the risk of driving him. He tried one last time to reach the friend who had dropped him off earlier that evening, but got no answer.

[15] The complainant did not want to send him outside in the winter, and proposed that he sleep on the couch. He responded that she is crying, he can comfort her, she has no worries, because "I get it, it's not what you want". Then they went into her

bedroom and got into the bed, with their clothes on. The accused closed the door, locking it as he did so, although the complainant did not find that out until she woke up in the middle of the night.

[16] The complainant was laying on her side facing the wall to the right of the bed, and the accused was behind her. He moved closer to her, into a spooning position. The accused kept talking to her, while she was trying to get to sleep. She was not answering, and told him "I'm trying to sleep, can you shut up so we can sleep?" He did not reply. She then told him it's not working, that if he doesn't want to sleep, he can go to the kitchen, but she wants to sleep. At some point he told her it will be hard for him to sleep because he has nightmares, so he doesn't want to be alone. He started talking about hardships he faces in his life, and she was not in a state of mind to be receptive to those stories.

[17] Then the accused started giving her compliments like she is nice, beautiful, and sings well. He said that she is sexy because she removed her vest earlier because it was too hot. Then his hand went under her clothes and touched her breast under her dress. He put his right leg on hers, and with his knee turned her on her back. He climbed on top of her. He tried to kiss her lips and neck, and she moved her head from side to side to avoid him. She repeated that this is not something she wants to do. In English, she testified that she told him "it is still not something I am in the mood for that".

[18] He kept kissing and touching her everywhere, under her dress, her lower back and on her breasts. She told herself, in her own head, that she had three options at this point. The first is that she could yell, but she was unable to do that. She felt like she was completely "blocked" and unable to speak. The second option was that she could push him away, but realized that she could maybe harm herself trying to do that because he was stronger than her. She clarified in cross-examination, though, that he had been basically gentle throughout the evening and didn't do or say anything to make her believe he would act aggressively if she acted out against him.

[19] The third option, which she ended up doing, was to just go with it, to let him do it. She used the phrase "laissez faire" to describe it. He undressed her slowly and himself as well. She said she was in a state that she can't really move or talk. She described herself "like a dog playing dead". He then penetrated vagina her with his penis. She said, despite it all, she said she has some condoms and asked him to wear one. This was so she wouldn't have to take a morning-after pill or catch some disease. She was not certain if she said this before or after penetration, and in cross-examination she was not sure if she said this or simply showed him the box of

condoms. In any event, he did not reply and did not put on a condom. The accused continued having intercourse with her until he ejaculated inside of her. There was discussion about that, and about the fact that she did not take any contraceptives, and the accused proposed that he would go to the drug store with her for a "Plan B" morning-after pill. She did not reply.

[20] She was asked if she wanted the accused to penetrate her vagina, and said she did not want it.

[21] The complainant was exhausted and fell asleep, with accused still in her bed. She woke up because he was snoring, went to the bathroom, and then put on pajamas and went back to sleep in her bed, with the accused still on the other side.

[22] She next remembers being woken up by the accused, and he proposing that they make breakfast. He started complimenting her again, saying she's beautiful, and he can't help himself. He kissed her on the lips and neck, and was touching her. He removed her pajamas ,and used force to separate her legs, using his thumbs on her inner thighs. She was asked what did she do when he did that, and she responded "I let him do it". She said she felt "really bad". She tried to move to get some space but was not successful.

[23] The accused again penetrated her vagina with his penis. This caused her pain in her pelvis at one point. At some point during this intercourse she started crying. He told her "don't worry, it's just me", but continued the intercourse until he again ejaculated inside of her.

[24] She said there had been no discussion about having sex before this happened. She did not want him to touch her, and did not want him to have intercourse with her that morning.

[25] After the accused ejaculated, he asked if there was something for breakfast, and went to the kitchen. The complainant fell asleep. He came back later to ask if she was hungry. She told him he can eat something and then leave. The accused asked if she was interested in doing something with him and his family that day, like skidooing, and she said she really needs time alone. He left, but said he would come back in a few hours. She told him she wasn't sure if she really wanted to do anything later, but the message wasn't getting through. He came back at 1 p.m., and she told him she didn't think he got it that she didn't want to do anything with him and his family. She took an hour-long shower hoping that that he would get the message that she didn't want him around. He was still waiting when she got out of the shower,

and she told him that she wanted him to leave and to leave her alone. He replied, "I get it, I understand", and left. She didn't see him again, nor did they talk or exchange messages.

[26] She took a morning-after pill that day. A few days later she went to the hospital to get tests done for sexually-transmitted diseases. When the nurse asked if this was an assault she started to cry. The nurse asked if she wanted to go to the RCMP to file a complaint, but at that point she did not want to. She felt overwhelmed, and had been trying to minimize what happened. She slept on her couch, because she wasn't able to sleep in her bed. However, she changed her mind a few hours later, and called the hospital, who in turn called the RCMP for her. This set in motion her interview with the police and the subsequent arrest of the accused.

[27] On cross-examination, certain details as to her initial meeting with the accused were put to her, and they appeared to trigger her memory and she readily agreed to them. She agreed that there was some casual banter with the accused on Facebook between that date and Dec. 28, that was not romantic or sexual. She agreed they had made friends with each other.

[28] On Dec. 28, the accused contacted her "out of the blue". The proposed meeting that was discussed was definitely intended to involve more people, such as Dave and Sandy. She agreed that when her roommate went to bed the roommate might have commented on how it looked the two of them were having fun, and she was going to leave them alone. The complainant did not disagree with that assessment.

[29] It was suggested to her that while she and accused were sitting on the couch listening to music, she occasionally put her hand on his thigh. She responded, maybe on his knee but not on the thigh. She said francophone people are sometimes a bit "touchy", although less than the Spanish.

[30] It was put to her that the accused may have asked if he could kiss her before the first time he did so. She responded that it is possible, but if he did she did not agree to it at all. That kiss triggered some memories in her, and she told the accused that. He asked why she was triggered and why she suddenly seemed sad. She said the kiss brought out a flood of memories of a different person. The accused came to comfort her.

[31] At that point she started looking into the possibility of going out and leaving the house. She wasn't comfortable with him kissing her, so she thought maybe she

can pursue the friendship and the mood will change with seeing other people. She agreed that the motivation was to go have some fun. She said that things were still going fine with the accused, but she still had it in her mind that she would prefer to be with other people instead of just the accused.

[32] She agreed that if she had needed to get her roommate's attention any time during the night it would be easy. If she yelled or knocked on the wall, her roommate would be there in seconds.

[33] She agreed that the accused never made any threats towards her and never showed any anger towards her. He was being complimentary of her during the evening, "sweet talking" her, and showing he was quite interested in her as the evening went on. However, she was not sure that he understood that she is not interested, even if she is saying that to him.

[34] She was shown a Facebook posting sent at 10:50 p.m.that night, of a bunny rabbit saying "Je t'aime" to a bear. The bear then says, in French, but we are not a couple nor lovers. The bunny rabbit then says ,you are a person I have strong feelings for, and it's too bad I have to hold myself and not say I love you when it is the case, because these words are reserved to a "sphère amoreuse". The bunny then says that the world would be a better place if they were allowed to express what they felt like. The cartoon ends with the bear saying, in French, "I love you too".

[35] The complainant agreed that it makes sense she had posted things on Facebook, even though she did not remember doing so. She agreed that it was a positive message, not a cry for help. It was a happy message of inclusiveness. She said, however, that she could post some happy stuff even if she was not in a happy mood.

[36] She was asked about the lighting in the bedroom, and she didn't remember if it was on or off. However, after thinking about it, she did recall the facial expressions of the accused, so she was sure that the light was on. It was dark out, so there was insufficient light coming in from the window to allow her to see this. The lamp was turned off after the first episode of intercourse.

[37] It was put to her that when the accused started kissing her neck she was making sounds that sounded like sounds of pleasure. She literally laughed at that suggestion, and said "I disagree with that". Other things were put to her that she disagreed with as to what happened on the bed, and it is unnecessary to discuss them because they were the questions of counsel, which were not adopted by the witness,

and which had no subsequent evidence to support them, so they are not evidence. She did agree that he said he was "horny" at one point. She definitely did not give him permission to take her clothes off. She did remove her own vest because it was hot, but was still wearing her dress and leggings.

[38] It was suggested to her that when she was moving her head around as he was trying to kiss her, it could appear that her moving head was a sign that she was enjoying the kissing. Her response was "I would be surprised, but that's a possibility".

[39] She was taken to a passage in her police statement where she said, in French, "at that moment I'm trying to see, you know, can I have pleasure in this situation or not. It turns out at one point he is done. He came, and we sleep." She did not disagree that she meant that she decided to make the best out of a bad situation and see if she could get some pleasure out of this situation. It was put to her that he came (ejaculated) too soon for her to experience any pleasure from the act. She agreed that, if you take it "on the first level", that was correct. She later clarified in re-examination that the first level would be the probable popular opinion of the situation. The second level is what is in the minds of both people.

[40] She agreed that the next morning, after the second incident of sexual intercourse, the accused was acting as if nothing was wrong, like it was a normal morning and he was fixing breakfast for both of them. But she took it as odd behaviour. There was no apology, he was happy go lucky and in a good mood when he left.

[41] She agreed that when he came back later in the day she made it clear that she didn't want to see him again, and he stopped. It was put to her that, in the preceding 24 hours, whenever she said she wanted him to stop he stopped. Her response was that he stopped at that second, but then tried again minutes later, and it went on like that.

[42] It was put to her that she agreed that he could come into bed with her. She said she wouldn't put it that way. She said "yes, that we go to the bedroom, to sleep". It was put to her that as things progressed she asked him to put a condom on, and her response was "yes, because I knew he wouldn't stop". She agreed that she considered three options, and made the decision "I'll just let him do it".

[43] That completes my relatively exhaustive summary of the evidence of the complainant.

[44] I found the complainant to be an extraordinarily credible and reliable witness. She was careful and thoughtful with her answers, and considered every one before responding. When it was suggested to her that she may have been wrong as to when she met the accused and D., and that it might have been in December, not mid-November, she was not combative, but was instead open to the suggestion that she may have been mistaken. However, on the morning break she checked her cell phone and found a message that confirmed that she had been right all along.

[45] She was not confrontational with counsel on cross-examination, nor did she try to avoid difficult questions. She agreed with reasonable propositions that were put to her, even when they had the potential to undermine certain aspects of her evidence. She volunteered evidence that clearly could be advantageous to the defence, such as her admission that she thought, at one point, that she might as well try to make the best of a bad situation and get some pleasure out of what was happening to her.

[46] She did not embellish her evidence in any way. Indeed, if she were making up a story about being sexually assaulted, one may have expected her to say that she physically resisted the advances of the accused, while repeatedly shouting "no, stop" to him, or some similar scenario. Instead, she said she considered her options in her own head and, in effect, simply decided not to resist what was going to happen anyway, and let him do it. She stayed silent at that moment because she was simply unable to speak.

[47] As is apparent from my extensive review of her evidence, it was not challenged in any meaningful way on cross-examination.

[48] I have no hesitation in accepting her evidence as a true and accurate account of what transpired on the night in question.

[49] In order to secure a conviction, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. That the accused applied some force to the complainant;
2. That the force was of a sexual nature;
3. That the complainant did not consent to the application of force; and,
4. That the accused knew that the complainant did not consent.

[50] As to the first two, it is beyond dispute that the accused applied force to the complainant of a sexual nature, when he kissed her initially in the living room, when he kissed and touched her body in the bedroom, and when he penetrated her vagina with his penis. He did so again the following morning when he penetrated her vagina with his penis. Thus, the first two elements have been proven beyond a reasonable doubt.

[51] The third element is that the complainant did not consent to this applicant of force. In his cross-examination of the complainant, defence counsel Mr. Hale discussed what it means to "consent" to something, and suggested that it is different that "wanting" to do something. He posited an example where a person doesn't "want" to go to the dentist, but they agree or consent to go because it is necessary to do so.

[52] However, that illustration does not represent the law.

[53] Consent is defined, for purposes of sexual assault, in s. 273.1(1) of the *Criminal Code*, as "the voluntary agreement of the complainant to engage in the sexual activity in question". No consent is obtained where, among other things, the complainant expresses, by words or conduct, a lack of agreement to engage in the activity.

[54] In the seminal decision of *R. v. Ewanchuk*, 1999 SCC 711, Major J. said the following, at para. 48:

> There is a difference in the concept of "consent" as it relates to the state of mind of the complainant vis-à-vis the i of the offence and the state of mind of the accused in respect of the *mens rea*. For the purposes of the *actus reus*, "consent" means that the complainant in her mind wanted the sexual touching to take place.

[55] So, it is clear that, for purposes of the *actus reus*, to consent to sexual touching is to *want* that sexual touching to take place.

[56] At para. 29, Major J. also said this:

> While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the

> trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

[57] The law is well settled that silence does not constitute consent, nor does submission or lack of resistance. Thus, the fact that she decided, in her mind, just to let him do it, cannot support the inference that she thereby consented to what was happening.

[58] Here, the complainant repeatedly and forcefully testified that she did not want to be kissed or touched or vaginally penetrated by the accused. She testified that she repeatedly told the accused that she was not interested in any of this, and only wanted to be friends, thereby expressing "a lack of agreement to engage in the activity", within the meaning of s. 273.2(1). While she did lie down in bed with the accused, she did so only to sleep, not to engage in sexual intercourse, and did so in reliance on his assurances that he "gets it", and knows that sexual contact is not what she wants.

[59] In my view, there is no evidence that raises any reasonable doubt against her assertion that she did not, in her mind, want the sexual touching to take place. I believe her evidence, and conclude that the Crown has proven, beyond a reasonable doubt, that she did not consent to any of the sexual touching described in her evidence.

[60] The fourth and final element that must be proven beyond a reasonable doubt is that the accused knew that the complainant did not consent.

[61] There are three ways in which the Crown may prove this knowledge, any one of which will be sufficient:

> 1. That the accused actually knew that the complainant did not consent to the sexual activity in question; or
>
> 2. That he knew there was a risk that she did not consent to the sexual activity in question, and he proceeded in the face of that risk; or
>
> 3. That the accused was aware of indications that the complainant did not consent to the sexual activity in question, but deliberately chose to ignore them because he did not want to know the truth. In other words, he was willfully blind to her lack of consent.

[62] In this case, all three avenues lead to the same conclusion, that the accused knew that the complainant did not consent. Actual knowledge is demonstrated by the fact that the complainant objected to the very first kiss, and made it clear to the accused that she was not interested in any of that behaviour, and only wanted to be friends. She repeated this on several occasions thereafter. She made it clear that she would lie down on the bed with him, but only to sleep and nothing more. While they were in the bed and he was touching her, just before vaginally penetrating her, she expressly told him she was "not in the mood" for this.

[63] The law is abundantly clear that "no means no". "No" does not mean that it is OK to try again a few minutes later. Nor does not mean that, after being told no, an accused can "test the waters" a short while later by again initiating sexual contact. Indeed, Moldaver J., in *R. v. Barton*, [2019] S.C.C. 33 at para. 107, stated that testing the waters is, in and of itself, a sexual assault.

[64] Even if these comments, and her body language of pulling away from the accused as he tried to kiss her, fell short of instilling actual knowledge in the accused that she did not want to engage in sexual activity with him, there is no doubt that, at the very least, they instilled in him the knowledge that there was a risk that she did not consent to having sexual activity with him. He deliberately proceeded to touch her and have sexual intercourse with her in the face of that risk.

[65] As to the third avenue, these same considerations constitute indications that she did not consent, which he deliberately chose to ignore because he did not want to know the truth. Indeed, on the complainant's evidence, the accused would initially react to the complainant's objections by stopping what he was doing and apologize, but then proceed to ignore those objections as he tried again a little while later. If he had asked her whether she wanted to have sex with him, there is no doubt that her answer would have been "no". But that was a question he did not want to ask, and an answer he did not want to hear.

[66] The defence relies on a number of points that, they argue, raise a reasonable doubt as to whether the accused knew the complainant was not consenting. They include the following:

- After considering her options, the complainant decided to let him do it;
- Once it began she tried to find some pleasure in it for herself;
- She offered a condom to the accused, which could be perceived as an invitation to have sex;

- The roommate left them alone, saying that it looked like they were having fun;
- The complainant touched the leg of the accused during their conversation;
- They sat on a love seat together, instead of on the two separate couches that were available;
- The complainant didn't get upset by the first kiss, but instead because of the memory that was triggered by the kiss;
- She wanted to be comforted by him, which involved wrapping his arms around her;
- It was a happy, friendly atmosphere when she posted the cartoon at 10:50 p.m.;
- She was content that he stay at her place and sleep in her bed;
- From his perspective she would have permitted him to remove her dress;
- While he was kissing her she was moving her head from side to side;
- His behaviour the next morning is inconsistent with someone who knows they did something wrong, and consistent with someone who is oblivious to the fact that he did something offensive or hurtful;
- He didn't apologize, and offered to pay for the morning-after pill.

[67] The problem with all of these points is that they only serve, at best, to support an inference that, by reason of all of these factors, the accused honestly, but mistakenly, believed that the complainant was consenting. As a matter of law, it is not open to the accused to ask the court to make this inference.

[68] Section 273.2 of the *Criminal Code* provides as follows:

> It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from
>
> (i) the accused's self-induced intoxication,
>
> (ii) the accused's recklessness or wilful blindness, or
>
> (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;

> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
>
> (c) there is no evidence that the complainant’s voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

[69] This section effectively codifies the defence of honest but mistaken belief in communicated consent. It is an affirmative defence, as opposed to an element of the offence itself which must be proven by the Crown beyond a reasonable doubt. If the accused demonstrates that there is air of reality to this defence, the Crown has the onus of disproving it.

[70] In this case, defence counsel conceded that there was no air of reality to this defence, and I am of the same view. First, I have already found that the accused was reckless or wilfully blind to the complainant’s lack of consent, thereby engaging ss. 273.2(a)(i). Most importantly, there is not a shred of evidence that the accused took reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting, as required by s. 273.2(b).

[71] However, defence counsel argues that rejecting an affirmative defence does not relieve the Crown from proving the fourth essential element in sexual assault, that the accused knew the complainant was not consenting. They rely on the points outlined above to argue that they raise a reasonable doubt on that issue.

[72] In my view, this argument has been laid to rest by the decision of the Ontario Court of Appeal in *R. v. H.W.*, 2022 ONCA 15. In a thorough and well-reasoned decision, Zarnett J.A., speaking for the court, examines recent jurisprudence on this point, and in particular the decision of the Supreme Court of Canada in *R. v. Morrison*, 2019 SCC 15, and recognizes that there is a difference between an affirmative defence and an essential element of the offence. He agrees that rejecting the defence of honest but mistaken belief in communicated consent does not relieve the Crown from proving the fourth essential element of sexual assault. However, his review of the caselaw makes it clear that this does not mean that an accused, whose mistaken belief defence is rejected because it has no air of reality, can nevertheless get that same defence before the court “through the back door”.

[73] He said this, at para. 90 to 93:

> Jury instructions in a case where there is no air of reality to the defence of honest but mistaken belief in communicated consent must be equally clear, but in such a case, the clarity required is that evidence of the accused's mistaken belief in consent is not to be considered at all when the jury determines whether the accused had the necessary *mens rea*. The provisions of the *Code* that limit the defence of honest but mistaken belief in communicated consent do not cease to apply to an assertion of a mistaken belief in consent that does not meet the requirements of the defence. The *Code* is clear. Any belief that does not meet the requirements of s. 273.2 of the *Code* is not a defence — it is not exculpatory.
>
> As this court held in *Carbone* in the case of invitation to sexual touching, "[i]f the accused fails to take reasonable steps to determine the complainant's age, he cannot advance the claim that he believed the complainant was the required age": *Carbone*, at para. 130; see also, *Morrison*, at paras. 83, 121 and 124. Any evidence of belief must be "removed from the evidentiary mix" in considering whether the Crown has met its burden: *Carbone*, at para. 129. Similarly, evidence of an accused's mistaken belief in the complainant's consent to sexual touching must also be removed from the evidentiary mix, if it is not within the range of beliefs in consent that "an accused may lawfully hold": *G.F.*, at para. 1.
>
> If it were otherwise, an accused could sidestep the stringent requirements for a defence of honest but mistaken belief in communicated consent by relying on this same belief, without reference to the restrictions imposed on it, at the *mens rea* stage.
>
> Care must thus be taken, in a case where the defence of honest but mistaken belief in communicated consent is unavailable, not to, for example, point the jury to evidence of belief in consent in their consideration of *mens rea* and thus allow the defence to re-enter through the back door: *MacIntyre* , at para. 67.

[74] The appeal in that case was allowed because the trial judge, after having ruled that there was no air of reality to a defence of honest but mistaken belief in communicated consent, proceeded to direct the jury, in determining whether the Crown had proven the fourth element – that the accused knew the complainant did not consent – to consider evidence supporting the inference of mistaken belief. This was a fatal error.

[75] The court recognized, at para. 65, that even where the defence is unavailable, the evidence, as a whole, may still leave gaps in the Crown's case that could give rise to a reasonable doubt as to whether the Crown has discharged their evidentiary burden with respect to *mens rea*. Hypotheticals were discussed where an accused

may not know of the lack of the complainant's consent on a basis other than a belief in consent. However, no such gaps have been identified in the case at bar. The evidence relied upon by the defence serves only to support an inference that the accused believed that the complainant was consenting. As the court stated at para. 98(b): "The jury should be instructed that they should not rely on evidence if it is only relevant in supporting an inference that the accused believed that the complainant was consenting or had communicated consent…"

[76] Since the evidence relied upon by the defence on the fourth element is only relevant in supporting an inference that the accused mistakenly believed that the complainant was consenting, and since there is no air of reality to such a defence, the court cannot consider this evidence in determining whether the Crown has discharged its burden of proving *mens rea*.

[77] I have already determined, above, that the Crown has proven, beyond a reasonable doubt, that the accused knew that the complainant did not consent, by reason of all three available routes to that conclusion. Since the Crown has similarly proven the other three essential elements of sexual assault beyond a reasonable doubt, the accused must be found guilty as charged.

T. A. Heeney
J.S.C.

Dated at Yellowknife, NT, this
13th day of December, 2024

Counsel for Crown: A. Paquin

Counsel for Accused: J. Hale

S-1-CR 2021 000 033

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

-and-

ALEX ROCHE

By court order made under s. 486.4(1) of the *Criminal Code*, information that may identify the person or persons described in this judgment as the complainants may not be published, broadcasted, or transmitted in any matter. This judgment complies with this restriction so that it can be published.

REASONS FOR JUDGMENT